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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1553

JOSEPH GREEN AND FREIGHT LIQUIDATORS, ETC.
Petitioner

v.

UNITED STATES, *Respondent*

PETITION FOR REHEARING

ALBERT J. AHERN, JR.
5205 Leesburg Pike
Baileys Crossroads, Va. 22041
Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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UNITED STATES, *Respondent*

PETITION FOR REHEARING

Petitioner prays that this Court grant a rehearing in the above entitled matter. This Court denied certiorari on October 15, 1974.

QUESTION PRESENTED

Should not this Court grant rehearing on whether the petitioner can be validly sentenced for each day of a sixty day period that an allegedly false advertisement

was published in the Washington Post in light of the fact that this Court has granted certiorari to the United States in *United States* v. *ITT Continental Baking Company,* No. 73-1290, wherein this Court will decide whether the trial court and appellate court were correct in holding that daily civil penalties could not be imposed and the question construed as a continuing violation of a consent order of the Federal Trade Commission under Title 15 USC, 21L, 45L.

STATEMENT OF THE CASE

The petitioner caused an advertisement to be inserted in The Washington Post which ran for sixty days. The petitioner was charged with the violation of Title 22, Sec. 1411 of the District of Columbia Code which prohibits false advertising. Section 22, 1413 of the District of Columbia Code defines the offense as a petty offense by imposing a maximum penalty of $500 and sixty days in jail. The Superior Court and the District of Columbia Court of Appeals have to this moment, unless rehearing is granted by this Court, allowed the offense to *be treated as a continuing offense for each day the article appeared in the paper.* In so doing they have converted a petty offense in punishment terms into a felony by artifically treating each day of the sixty days as a separate independent offense for which a separate penalty could be assessed. This Court denied certiorari on October 15, 1974. This petition for rehearing is filed in light of this Court's granting of certiorari in *United States* v. *ITT Continental Baking Company,* No. 73-1290, which deals with whether a course of conduct is a continuing one for which separate civil penalties can be assessed or whether it is one violation for which one penalty may be assessed.

ARGUMENT

We feel that this Court's grant of certiorari in *United States* v. *ITT Continental Baking Company,* No. 1290, which will decide whether the Courts were justified in refusing to impose daily civil penalties against the respondent for allegedly violating over a period of time a consent order of the Federal Trade Commission when they held it constituted a single violation for which only one penalty could be imposed should induce this Court to grant rehearing in this case. This Court should decide whether it comports with due process of law to allow the Government to convert a petty offense, Title 22, Sec. 1411, which has a maximum penalty of sixty days in jail or $500, into an offense of major proportions and in effect transform it from an imprisonment point of view to a felony statute by the simple expedient of construing each day's publication in The Washington Post as a separate offense.

It would appear that resolution of this issue by the Court in this case will have direct bearing on the reasoning and determination of whether daily civil penalties could be imposed in *United States* v. *ITT Continental Baking Company, supra.* Even if this Court ultimately sees fit not to review the total merits of the petitioner's petition for certiorari, under this Court's rulings in *United States* v. *C.I.T. Corporation,* 344 U.S. 218, Sup. Ct. 277, and *Ladner* v. *United States* 358 U.S. 169, 79 S.Ct. 209, this Court should grant review with respect to the sentence imposed in this case. The present sentence imposing a prison term of over three years and/or a fine of $22,800.00 *defies reason and common sense in allowing a petty offense to be escalated into the punishment of a felony*

by the invocation of the concept that for each day the article appeared in the paper a separate and independent crime was committed.

This view fully accords with the settled principle that statutes should be construed to avoid unfairness or oppression, e.g., *Carlisle* v. *United States,* 83 U.S. (16 Wall.) 147 (1872), and this canon has been followed even in cases where the statutory language did not easily comport with such a solution. This Court has held that a penalty may not be imposed where the Government standard is such

> "That men of common intelligence must necessarily guess at its meaning and differ as to its application. *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 287 (1961) quoting from, *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). See also *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966).

The statute must be given a construction comporting with common sense. The sentence imposed herein making each day the article appeared in the paper a separate offense for which a consecutive sentence could be imposed does violence to due process and in fact constitutes cruel and unusual punishment.

Respectfully submitted,

ALBERT J. AHERN, JR.
5205 Leesburg Pike
Baileys Crossroads, Va. 22041
Counsel for Petitioner

Certificate of Good Faith

I, Albert J. Ahern, Jr., being a member of the Bar, do hereby certify that the above Petition for Rehearing is filed in good faith and raises an issue that counsel does not feel has been gleaned from the original petition, and not for the purposes of delay.

ALBERT J. AHERN, JR.